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NO. 80-6878

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

MICHAEL GERALD VANDINBERG,

Appellart,

v.

STATE OF OREGON, et al,

Appellee,

On Appeal from the Supreme Court of Oregon

JURISDICTIONAL STATEMENT

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A. QUESTIONS PRESENTED

1. Whether under the Fourteenth Amendment an allegedly mentally deficient person may be committed indefinitely to the custody of the State Mental Health Department based soley on the individual's score on 'scientific' intelligence tests without a showing that the individual is either dangerous to himself or others or unable to provide for his basic personal needs.

2. Whether principles of double jeopardy or res judicata protect an allegedly mentally deficient person over 18 years of age from successive attempts to commit him based on his mental condition prior to the age of 18.

B. PARTIES TO THE PROCEEDING

Michael Gerald Vandenberg

State of Oregon

John Vandenberg

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D. REFERENCE TO REPORTED OPINIONS BELOW

The only opinion rendered below was that of the Oregon Court of Appeals in the case of In the Matter of Michael G. Vandenberg, Alleged to be Mentally Deficient, State ex rel John Vandenberg v. Michael Gerald Vandenberg, 48 Or App 609, 617 P2d 675, a copy of which is included as Appendix B.

Copies of the unreported orders of the Oregon Supreme Court denying review and denying rehearing are also attached as appendices.

E. GROUNDS OF JURISDICTION

1. This is a civil mental commitment proceeding. Appellant's commitment was sought and obtained on the basis of his alleged mental deficiency.

2. Appellant was committed by the trial court on August 14, 1979. That decision was affirmed by the Oregon Court of Appeals on October 6, 1980. Appellant's Petition for Review to the Oregon Supreme Court was denied on February 4, 1981. Appellant's Petition for Rehearing was denied by the Oregon Supreme Court on March 17, 1981. The Notice of Appeal was filed June 15, 1981, in the Oregon Supreme Court.

3. Jurisdiction is conferred on this Court by 28 USC Section 1257(2).

F. CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS AT ISSUE

United States Constitution, Amendment XIV

> "...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Oregon Revised Statutes, Section 427.015:

> Petition for Commitment of Mentally Deficient Person. The judge of any probate court or, if the Circuit Court is not the probate court, the Circuit Court if its

jurisdiction has been extended to include commitment of the mentally deficient pursuant to ORS 3.275 may, upon written petition of any citizen, alleging that any person is mentally deficient and by reason thereof is need of care, custody or training, cause such person to be brought before him at such time and place as he may direct.

ORS 427.025. Precommitment examination required; examination facilities. (1) If, after receiving a petition for commitment and viewing the person alleged to be mentally deficient, the judge considers the person to be in need of care, custody or training, he shall order a precommitment physical and mental examination of the person at a facility or institution as provided is subsection (2) of this section. No person shall be committed to the Mental Health Division as mentally deficient without a precommitment examination.

ORS 427.045. Report of findings; recommendations. (1) The facility or institution which makes the examination under ORS 427.025 shall report its findings to the court within 30 days of completion of the examination. These findings shall indicate whether the person is mentally deficient, and recommend the type of treatment which is in the best interest of the person, his family and the community.

ORS 427.059. Certification of mental deficiency; order of commitment; copy to division. (1) If the findings of the examining facility or institution are that the person is mentally deficient, the judge may certify that the person is mentally deficient. If he certifies that the person is mentally deficient he may order the person commited to the Mental Health Division.***

Oregon Administrative Rules 309-42-000

"(1) Purpose. This rule prescribes criteria for voluntary admission to a state institution for the mentally retared and criteria for the examining authority's recommendation to a court on commitment of a person alleged to be mentally retarded to the Mental Health Division...

(2) Statutory Authority and Procedure. This rule is authorized by ORS 430.041(1) and carries out the provisions of ORS Chapter 427.

(3) Definitions. As used in this rule:

... (c) 'Mental retardation; means significantly subaverage intellectural [sic] functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period. Persons of borderline intelligence may be considered mentally retarded if there is also serious impairment of adaptive behavior. Definitions and classifications shall be consistent with the 'Manual on Terminology and Classification in Mental Retardation' of the American Association on Mental Deficiency, 1977 Revision. Mental retardation is synonymous with mental deficiency:

(A) 'Adaptive behavior' means the effectiveness or degree with which an individual meets the standards or personal independence and social responsibility expected for age and cultural group.

(B) 'Developmental period' means the period of time between birth and the 18th birthday.

(C) 'Intellectual functioning' means functioning as assessed by one or more of the individually administered general intelligence tests developed for that purpose.

(D) 'Significantly subaverage' means a score on a test of intellectual functioning that is two or more standard deviations below the mean for the test...

(4) Admission Criteria. Before the name of a person whose application form has been approved is placed on the waiting list for admission to a state institution for the mentally retarded, or before an examining authority may recommend to a court the commitment of an allegedly mentally retarded person to the Mental Health Division, the diagnosis and Evaluation Service of the Division shall determine that:

(a) An examining authority has found the person to be mentally retarded based upon the 'Manual on Terminology and Classification in Mental Retardation" of the American Association on Mental Deficiency, 1977 Revision, including a comprehensive evaluation covering physical, social and cognitive factors and considering past and present behavior of the person. In addition to those persons' meeting the AAMD definitions, the manual allows that persons who score in the borderline range (IQ 70-79) on tests of intellectual functioning may be diagnosed mildly retarded if their adaptive behavior is in the retarded range, unless the examiner can definitely attribute the adaptive deficits to such factors as mental or emotional disturbance, sensory impairments or other such variables.

(b) Admission to a state institution for the mentally retarded is determined to be the optimal available plan and is in the best interest of the person and the community...."

G. STATEMENT OF THE CASE

On September 22, 1978, a petition alleging the mental deficiency of Michael Gerald Vandenberg, then 19 years old, was filed in the Marion County Circuit Court. Court appointed examiners concluded defendant was not mentally deficient and following a hearing on October 31, 1978, the Court dismissed the petition. On June 21, 1979, an identical petition was refiled.

The petition alleged that the defendant was "a mentally deficient person and by reason thereof is in need of care, custody and training in an institution for the mentally deficient."

A second court ordered examination was undertaken, which concluded that defendant was mentally deficient. Following a hearing the trial court entered a order providing:

> "This Court finds and certifies that said Michael Gearld Vandenberg is a mentally deficient person and that by reason thereof is in need of care, custody or training and should be committed to an institution for the mentally deficient."

The Court made no finding that appellant was dangerous or unable to care for himself, nor did the evidence support such a finding.

Prior to the evidentiary hearing in the trial court defendant filed a Demurrer which alleged that the commitment procedure violated the United States Constitution, Amendment XIV in that the term mental deficiency was vague and overbroad. The defendant also moved to dismiss the proceeding on the grounds of double jeopardy and res judicata based on the Circuit Court's previous dismissal of the same petition. The trial court overruled the demurrer and denied the Motion to Dismiss.

On appeal the defendant again alleged in his brief that the commitment procedure was unconstitutionally vague and overbroad by its allowance of commitment without a showing that the allegedly mentally deficient person was dangerous to himself or others. The appellate court concluded in its opinion that the challenged procedure suffered from no constitutional infirmities.

Following appellant's commitment the Oregon Legislature amended the statutory procedures at issue. The amended provisions now require a showing of dangerousness to self or others and provide for the periodic review of persons committed.

H. SUBSTANTIALITY OF QUESTIONS PRESENTED

In O'Connor v. Donaldson, 422 US 563, 95 SCt 2486, 45 LEd2 396 (1975) this Court, per Justice Stewart, declared:

> "A finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement. Assuming that that term can be given a reasonable precise content and that the 'mentally ill' can be identified with reasonable accuracy, there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom." 422 US at 575.

The principle that 'dangerousness to self or others' is an essential element of any constitutional involuntary commitment would thus seem to be well established.

The development of the law of involuntary mental commitment has been such, however, that the Court has never had the opportunity to apply that principle in the context of a due process challenge to a civil commitment statute. Consequently, a review of both this case and the variety of present state commitment proceedings for the mentally deficient reveals that the apparent holding of O'Connor v. Donaldson is generally honored in the breech.

Three years before O'Connor the Court noted in Jackson v. Indiana, 406 US 715 (1972):

> "The States have traditionally exercised broad power to commit persons found to be mentally ill. The substantive limitations on the exercise of this power and the procedures for invoking it vary drastically among the States ... The bases that have been articulated include dangerousness to self, dangerousness to others, and the need for care or treatment or training. Considering the number of persons affected, it is perhaps remarkable that the substantive constitutional limitations on this power have not been more frequently litigated.
>
> "We need not address these broad questions here." 406 US 736-737.

The remarkable lack of litigation as to the substantive limitations of a State's involuntary commitment powers has continued to the present, as is apparent from the three mental commitment cases following Jackson v. Indiana.

Addressing itself in O'Connor v. Donaldson, supra, 422 US at 573, to the "single, relatively simple, but nonetheless important question concerning every man's constitutional right to liberty" the Court noted that "... this case involves no challenge to initial commitment." 422 US at 567. Subsequently in Addington v. Texas, 441 US 418, 99 SCt 1804, 60 LEd2 323 (1979) the Court was confronted with a standard of proof question in a mental commitment proceeding, again a case in which it was "clear that no challenge to the constitutionality of any Texas statute was presented." 99 SCt at 1807. In Parham v. J. R., 442 US 584, 99 SCt 2493, 61 LEd2 101 (1979) the Court considered the due process requirements of a voluntary commitment scheme for children.

In the case of Youngberg v. Romeo, No. 80-1429, in which review was recently allowed the issue relates to the existence

of a constitutional right to treatment for a retarded person already commited -- a troublesome issue left inresolved by O'Connor, but one which is unlikely to illuminate the standards for commitment in the first instance.

The uncertainty associated with the dearth of case law regarding the requirements of constitutional civil commitment and concomitant confusion has been widely discussed. The obeservations, for example, of a study relied on by the Court in Jackson v. Indiana, supra, 406 US 715, 736, "The Mentally Disabled and the Law" (revised edition, 1971), American Bar Foundation, Brakel and Rock, eds., remain equally appropros today:

> "The solution to this problem would appear to be a sound and discriminating definition not only of mental illness but also of the circumstances under which compulsory hospitalization is appropriate. However, no existing definition of mental illness and of the legal criteria for involuntary hospitalization meets this standard, nor is one likely to be forthcoming. This fact has been recognized in much of the recent legislation governing hospitalization." ABF Study page 60

In its conclusions and recommendations the report continues:

> "1) Efforts to develop a clear and workable statutory definition of the degree of mental illness which justifies involuntary hospitalization should continue. Statutory language is generally so ambiguous that it is difficult to determine the threshold degree of mental illness that justifies involuntary hospitalization." ABF Study pp 61-62.

It should be noted that the problems associated with "mental illness" are at least, if not more troubling in the closely related context of "mental deficiency," where states have generally provided even scantier legislative guidance. While such statutory provisions as Michigan's Comp. Laws Ann. 1967 Section 330.54:

> "The term 'mentally handicapped' shall include morons, idiots, imbeciles and those as to whom congenital defects have produced the same deficiency..."

have generally been amended, the alternatives which have evolved are plainly not altogether free from their own vagueness and overbreadth. The Oregon definitions at issue (which remain the same following that state's amendment to its commitment scheme) seem even more definite, for example, than those provided by present Iowa law, Iowa Code Ann. 1969,Section 222.2.4:

> "'Mental retardation' or 'mentally retarded' means a term or terms to describe children and adults who as a result of inadequately developed intelligence are significantly impaired in ability to learn or to adapt to the demands of society."

Such non-adaptive Iowans may be committed if

> "...it will be conducive to the welfare of such person and of the community to place the person under guardianship, or to commit the person to some proper institution for treatment, training, instruction, care, habilitation, and support..."

The present law of Georgia provides:

> "Mental retardation means a state of subaverage general intellectual functioning which originates during the developmental period and is associated with impairment in adaptive behavior." Ga Code Ann. 1963,Section 88-2502(a)

A person of such subaverage intellectual functioning may be committed if he or she is "in need of additional care, training, education or other specialized services." Section 88-2504(4)(f).

The principal problem with the Oregon statute at issue and the numerous other state statutes of which it is typical is that they allow the commitment of a person "in need of care," or "in need of training." Those terms are simply too broad, since virtually every citizen could benefit from some 'training' be it in physical proficiency, occupational skills, interpersonal relations or any of a wide variety of other areas of contemporary social intercourse. These statutes have evolved from an assumption that certain people obviously cannot function in society, an assumption undoubtedly true in many instances but one that fails to protect individuals from ad hoc and biased treatment borne of the discomfort among 'normal' people frequently engendered by contact with those mentally 'different.' See O'Connor v. Donaldson, supra, 422 US 575.

The Oregon commitment procedure now before the Court provides an excellent opportunity for developing the law in this important area of individual liberty not only because the issue has been clearly raised and preserved, but because the statutory scheme may justifiably be categorized as second generation. That is, the statute transcends the formerly typical 'feeble minded,' 'moron,' 'imbecile' language in a principled attempt to define

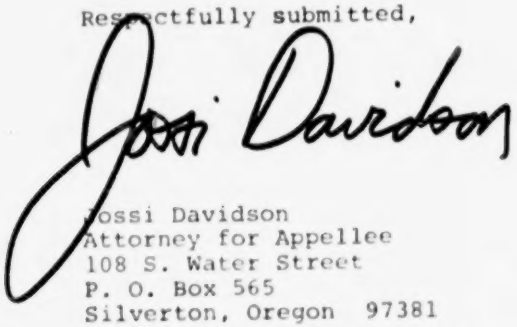
mental retardation in a useful manner. That definition is one promulgated by the American Association on Mental Deficiency and which can be expected to become increasingly widely adopted. See for example the Georgia definition supra. Whether the definition achieves the 'reasonably precise content' and 'reasonable accuracy' required by O'Connor, supra, 422 US at 575 is one major question. Equally important, however -- even assuming the constitutional validity of the definition -- is whether such statutes adequately protect the right of an otherwise capable individual to "prefer his home to the comforts of an institution." O'Connor, supra, 422 US at 575.

The present case also presents interesting and important issues arrising from the assumed permanance of mental deficiency. Since that condition, unlike mental illness, is definitionally required to have been established before the age of 18 years (the developmental period) for example, is an individual afforded any protection from successive attempts to commit him once it has been determined that he was not mentally deficient during that period? Also, is an allegedly mentally deficient person denied equal protection of the laws when the procedures for determining his condition and subsequent treatment differ from those governing the treatment of allegedly mentally ill persons, as they do under the law of Oregon and many other states? A further issue involves the propriety of the Oregon appellate court's express reliance on Parham v. J. R., supra, to support the holding that the challenged involuntary commitment procedure is constitutional (p 6a) since Parham involved a voluntary commitment scheme and is thus wholly inapposite.

While such other issues are raised by the present case, their decision is definitely ancillary to the major constitutional question discussed above. The existence of such further issues

is simply indicative of the vast uncertainty which continues to afflict the area of involuntary civil commitment.

Respectfully submitted,



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Appendix A

Mental Deficiency Commitment--5

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION (FOR [illegible] COUNTY)

Probate Court

FILED

IN THE MATTER OF)
MICHAEL GERALD VANDENBURG)
A Mentally Deficient Person)

CERTIFICATION OF MENTAL DEFICIENCY AND ORDER OF COMMITMENT
No. 1150

MAR 31 11 04 '80

A pre-commitment physical and mental examination having been duly made of Michael Gerald Vandenburg at Diagnostic & Evaluation Center (approved facility) pursuant to order of this court, entered on the 27th day of June, [illegible], and the facility having reported to this court its findings that said MICHAEL GERALD VANDENBURG is a mentally deficient person; and due proceedings and deliberation have been had, this court

FINDS AND CERTIFIES that said MICHAEL GERALD VANDENBURG is a mentally deficient person and that by reason thereof is in need of care, custody or training and should be committed to an institution for the mentally deficient; and it is

ORDERED that said MICHAEL GERALD VANDENBURG is hereby committed by the Mental Health Division of the State of Oregon for an indeterminate period of detention, and after receipt of notice from the institution that there is room for the said person, that he be thereupon placed in the custody of the aforesaid institution, as provided by statute

IT IS FURTHER ORDERED that there be furnished to the Mental Health Division, as required by ORS 427.090, all available information concerning the person committed by this order except such information as shall have been furnished previously.

Date this 14th day of August, 19 79.

Circuit Judge

(over)

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Appendix B

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of
Michael Gerald Vandenberg,
Alleged to be Mentally Deficient,

State of Oregon, ex rel
John Vandenberg,

Respondent,

v.

No. 1158
CA 15533

Michael Gerald Vandenberg,

Appellant.

****

Appeal from Circuit Court, Marion County.

Clarke C. Brown, Judge.

Argued and submitted July 14, 1980.

Jossi Davidson, Silverton, argued the cause and filed the brief for appellant.

Richard M. Botteri, Portland, argued the cause and filed the brief for respondent.

James C. Rhodes, Assistant Attorney General, Salem, waived appearance for State of Oregon.

Before Gillette, Presiding Judge, and Roberts and Campbell, Judges.

ROBERTS, J.

Affirmed.

FILED OCTOBER 6, 1980

DVAN

ROBERTS, J.

This case presents a challenge to commitment proceedings for mental deficiency under former ORS ch 427.[1] Defendant challenges the constitutionality of the commitment procedure, and argues that principles of double jeopardy and res judicata are applicable to this case. He further contends that the standard of proof required in the commitment hearing was proof "beyond a reasonable doubt" and that this standard was not met.[2]

The trial court overruled defendant's demurrer alleging the vagueness of the underlying statute and denied a motion to dismiss based on a previous commitment proceeding. We affirm the certification of mental deficiency and order of commitment.

Defendant is a 21-year-old man first admitted voluntarily to Fairview Hospital and Training Center at the age of 17. He was a resident there from August to November, 1976, and was again voluntarily admitted in February of 1977. In August, 1977, defendant turned 18, and was evaluated pursuant to former ORS 427.250 to determine whether he was still mentally deficient and in need of further residential care, treatment, training or education. The two psychologists who examined defendant in the spring and summer of 1978 found him not to be mentally deficient.

Fairview's chief medical officer disagreed and filed a petition on behalf of the Mental Health Division alleging defendant was mentally deficient and in need of care and treatment. A full hearing was held in October, 1978. This proceeding was dismissed by the trial court when the representative of the Fairview Hospital administration testified it was the institution's position that defendant was not mentally deficient.[3]

In March, 1979, defendant entered a residential group home in Portland. He reportedly had behavioral problems there, including failure to take medication to control his epileptic seizures, stealing money, failure to attend a work program or keep specified hours, and running away. Defendant's father then filed a petition to commit him to the Mental Health Division, pursuant to former ORS 427.015. A precommitment examination was ordered, and defendant was found to be mentally deficient. The recommendation by the examining institution, Fairview Hospital, was that defendant be returned to its care. The trial judge certified that defendant was mentally deficient and ordered his commitment to the Mental Health Division in August, 1979.

Defendant alleges that the statutory procedure under which he was committed, former ORS 427.015 et seq, was unconstitutionally vague and overbroad in that no definition of "mental deficiency" was contained in the statute. However,

in commitment of the mentally deficient, the court does not play the same fact-finding role that it does in commitment of the mentally ill under ORS ch 426. In commitment of the mentally ill the court is empowered to "determine" (ORS 426.130) whether a person is

> "(2) * * * because of a mental disorder * * * either
>
> "(a) [d]angerous to himself or others; or
>
> "(b) [u]nable to provide for his basic personal needs and is not receiving such care as is necessary for his health or safety.
>
> "* * * * *." ORS 426.005(2)(a) and (b).

Statutes for the commitment of the mentally ill, when strictly construed, were held not to be unconstitutional on the grounds of vagueness in State v. O'Neill, 274 Or 59, 66, 545 P2d 97 (1976), the Supreme Court noting that the state has a legitimate interest in providing care and assistance to the unfortunate.[4]

In commitment proceedings for the mentally deficient, the standard for commitment is set by scientific tests monitoring levels of intellectual functioning and adaptive behavior. This fact-finding authority was vested in the Mental Health Division. ORS 430.041(1). Under the former statute, the court was authorized to "certify" a person as mentally deficient only after the examining institution had so found.

A statutory and administrative scheme for the

involuntary commitment of minors by their parents in the state of Georgia was recently found by the United States Supreme Court to be constitutionally sound. Parham v. J. R., 442 US 584, 99 S Ct 2493, 61 L Ed 2d 101 (1979). In Parham, the Georgia statute allowed for a determination by the superintendent of each institution as to whether a child showed evidence of mental illness and should be admitted. There were no administrative regulations defining procedures the superintendents should use in making such a determination. The Supreme Court held the lack of regulations did not vest unbridled discretion in the admitting physicians, even where procedures differed from institution to institution.

Unlike the Georgia scheme, Oregon's former commitment statute for mental deficiency was supplemented by detailed administrative rules which provided a standard for finding a person mentally deficient.[5] In addition, former ORS 427.059 and 427.062 provided for judicial review of the administrative finding, and an adversary hearing, including the appointment of counsel. Oregon's commitment scheme thus vastly exceeds the procedural safeguards accepted by the United States Supreme Court in Parham. We hold that under the standards of Parham and O'Neill, former ORS 427.015 et seq was neither constitutionally vague nor procedurally infirm and did not violate defendant's rights under the Fourteenth Amendment to

the United States Constitution.

The trial court's denial of a motion to dismiss on the ground of a previous proceeding was proper. Defendant's contentions that double jeopardy or res judicata operate as a bar to two consecutive mental commitment proceedings have no merit. First, a mental commitment proceeding, though it involves a serious deprivation of liberty, is not a criminal proceeding. State v. O'Neill, supra, 274 Or at 72. Thus the principle of double jeopardy has no application.

The principle of res judicata likewise has no application in this particular case. In order for the doctrine of res judicata to apply, the prior lawsuit must have ended in an adjudication of issues which culminated in a final decree. McAllister v. Charter First Mortg., Inc., 279 Or 279, 285, 567 P2d 539 (1977), Huszar v. Certified Realty Co., 272 Or 517, 523, 524, 538 P2d 57 (1975). Defendant's prior commitment proceeding was dismissed by the court, without findings, after an administrative determination that the defendant was not mentally deficient. See n 3, infra.

At the close of the testimony in the August, 1979, hearing, the trial judge found he had been convinced beyond a reasonable doubt that the defendant suffered from mild mental retardation. We believe this was the proper standard to apply and we believe it was met.

Prior to the 1979 revisions, ORS ch 427 did not specify any standard of proof for a determination of mental deficiency. Since, however, the deprivation of liberty involved in a commitment for mental deficiency is at least as great as that in mental illness,[6] the standard the court should have used in evaluating evidence relied upon by Fairview should have been that required for commitment as a mentally ill person. The standard then was proof "beyond a reasonable doubt."[7]

In determining whether this standard of proof was met, we review de novo as in commitments of the mentally ill. State v. O'Neill, supra, State v. Arnold, 36 Or App 869, 586 P2d 93 (1978). However, substantial weight is accorded the findings of the trial court, which had an opportunity to observe and question the defendant. State v. Watkins, 35 Or App 87, 581 P2d 90 (1978).

Under OAR 309-42-000(3)(c), certification for mental deficiency requires a showing of three elements: (1) a significantly subaverage performance on general intelligence tests, (2) a failure to meet the standards of personal independence and social responsibility expected for the age and cultural group, and (3) manifestation of these conditions during the time period before the subject's 18th birthday.

The record below, which incorporates the transcript from the October, 1978 hearing, shows that five doctors testified

as to defendant's condition. A physician, a psychiatrist and two psychologists testified that defendant's IQ was significantly subaverage. His adaptive behavior was found to be impaired by every doctor except the two psychologists who examined defendant before his discharge from Fairview and the behavioral incidents which took place thereafter, during defendant's stay at the Portland group home. Thirdly, defendant was diagnosed as retarded on three separate occasions before his 18th birthday. This places the first recognition of defendant's condition within the developmental period.

The evidence established beyond a reasonable doubt that defendant suffers from mild mental retardation. The certification of mental deficiency and order of commitment were proper. We affirm.

Affirmed.

FOOTNOTES

1

Defendant's involuntary commitment pursuant to former ORS 427.059 was the result of an action commenced in June, 1979. That portion of chapter 427 dealing with commitment procedure was repealed and replaced by Oregon Laws 1979, ch 683, which took effect October 3, 1979.

2

Defendant also argues that the judge below erred in failing to allow defense counsel's closing argument. The record shows, however, that at the close of testimony, the court asked counsel for both parties if there would be "anything further," to which defense counsel replied, "We have nothing." The judge then made his ruling. Whatever misunderstanding this may evidence, defense counsel made no objection at the time. This alleged error is thus not properly before us. Liberty Mutual Fire Ins. v. Hubbard, 275 Or 567, 551 P2d 1288 (1976), Weber v. Kamyr, Inc., 269 Or 617, 634, 525 P2d 1307 (1974).

3

Former ORS 427.059(1) provided:

"(1) If the findings of the examining facility or institution are that the person is mentally deficient,

the judge may certify that the person is mentally deficient. If he certifies that the person is mentally deficient, he may order the person committed to the Mental Health Division."

The trial judge concluded that he had no independent authority to make a finding of mental deficiency where the examining institution had declined to do so.

4

Citing O'Connor v. Donaldson, 422 US 563, 95 S Ct 2486, 45 L Ed 2d 396 (1975).

5

OAR 309-42-000 provides in pertinent part:

"(1) Purpose. This rule prescribes criteria for voluntary admission to a state institution for the mentally retarded and criteria for the examining authority's recommendation to a court on commitment of a person alleged to be mentally retarded to the Mental Health Division. This rule also prescribes a procedure for the release of certain residents from state institutions for the mentally retarded.

"(2) Statutory Authority and Procedure. This rule is authorized by ORS 430.041(1) and carries out the provisions of ORS Chapter 427.

"(3) Definitions. As used in this rule:

"(a) 'Division' means the Mental Health Division of the Department of Human Resources.

"(b) 'Examining authority' means the Diagnosis and Evaluation service of the Mental Health Division or any facility designated by the Diagnosis and Evaluation Service to act as an examining authority for the purpose of this rule.

"(c) 'Mental retardation' means significantly subaverage general intellectural [sic] functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period. Persons of borderline intelligence may be considered mentally retarded if there is also serious impairment of adaptive behavior. Definitions and classifications shall be consistent with the 'Manual on Terminology and Classification in Mental Retardation' of the American Association on Mental Deficiency, 1977 Revision. Mental retardation is synonymous with mental deficiency:

"(A) 'Adaptive behavior' means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected for age and cultural group.

"(B) 'Developmental period' means the period of time between birth and the 18th birthday.

"(C) 'Intellectual functioning' means functioning as assessed by one or more of the individually administered general intelligence tests developed for that purpose.

"(D) 'Significantly subaverage' means a score on a test of intellectual functioning that is two or more standard deviations below the mean for the test.

"(d) 'State institution' means Fairview Hospital and Training Center and Eastern Oregon Hospital and Training Center of the Mental Health Division or any other Mental Health Division facility that accepts transferees from these two institutions.

"(4) Admission Criteria. Before the name of a person whose application form has been approved is placed on the waiting list for admission to a state institution for the mentally retarded, or before an examining authority may recommend to a court the commitment of an allegedly mentally retarded person to the Mental Health Division, the diagnosis and Evaluation Service of the Division shall determine that:

"(a) An examining authority has found the person

> to be mentally retarded based upon the "Manual on Terminology and Classification in Mental Retardation' of the American Association on Mental Deficiency, 1977 Revision, including a comprehensive evaluation covering physical, social, and cognitive factors and considering past and present behavior of the person. In addition to those persons' meeting the AAMD definitions, the manual allows that persons who score in the borderline range (IQ 70--79) on tests of intellectual functioning may be diagnosed mildly retarded if their adaptive behavior is in the retarded range, unless the examiner can definitely attribute the adaptive deficits to such factors as mental or emotional disturbance, sensory impairments, or other such variables.
>
> "(b) Admission to a state institution for the mentally retarded is determined to be the optimal available plan and is in the best interest of the person and the community. * * *
>
> "* * * * * *."

6

Under old and new ORS ch 426, committees for mental illness have their status reviewed every 180 days. There was no comparable provision for the mentally deficient under former ORS ch 427.

7

Former ORS 426.130. We note that the standard for commitment under both chapters was made the same and changed to "clear and convincing evidence" by the 1979 amendments. ORS 426.130, 427.290. This is in keeping with the United States Supreme Court's holding in Addington v. Texas, 441 US 418, 99 S Ct 1804, 60 L Ed 2d 323 (1979).

Appendix C

SUPREME COURT COURT of APPEALS

ELIZABETH D. BELSHAW
State Court Administrator
378-6046

ADMINISTRATIVE OFFICE
SUPREME COURT BLDG.
SALEM, OREGON 97310

Telephone Area Code — 503
Re Cases on Appeal 378-6025
Legal Counsel 378-6022
Oreg. Reports Editor 378-2832

February 4, 1981

Jossi Davidson
Attorney at Law
108 S. Water Street
Silverton, Oregon 97381

Re: State of Oregon, ex rel, Vandenberg v. Vandenberg
CA 15533 SC 27427

Dear Mr. Davidson:

The Supreme Court today denied appellant's Petition for Review in the above-entitled matter.

This letter constitutes the order of the Supreme Court denying the petition.

Very truly yours,

Marilyn Hartley

Marilyn Hartley
Supreme Court Calendar Clerk

MH/np
cc: Richard M. Botteri

Appendix D

SUPREME COURT COURT of APPEALS

ELIZABETH D. BELSHAW
[redacted]
State Court Administrator
378-6046

ADMINISTRATIVE OFFICE
SUPREME COURT BLDG.
SALEM, OREGON 97310

Telephone Area Code — 503
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Legal Counsel 378-6022
Oreg. Reports Editor 378-3832

March 17, 1981

Jossi Davidson
Attorney at Law
108 S. Water Street
P.O. Box 565
Silverton, Oregon 97381

Re: State of Oregon, ex rel Vandenberg v. Vandenberg
CA 15533 SC 27427

Dear Mr. Davidson:

The Supreme Court today denied appellant's Petition for Reconsideration in the above-entitled matter.

This letter constitutes the order of the Supreme Court denying the petition.

Very truly yours,

Marilyn Hartley

Marilyn Hartley
Supreme Court Calendar Clerk

MH/np
cc: Richard M. Botteri

Appendix E

FILED
June 15, 1981
(continued
by tel.)

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of MICHAEL GERALD VANDENBERG, Alleged to be Mentally Deficient,	)	
STATE OF OREGON, ex rel, JOHN VANDENBERG,	)	Trial Court No. 1158
Plaintiff-Respondent,	)	Appellate Court No. 15533
v.	)	
MICHAEL GERALD VANDENBERG,	)	Supreme Court No. 27427
Defendant-Appellant.	)	

NOTICE OF APPEAL
TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Michael Gerald Vandenberg, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Oregon Supreme Court denying appellant's Petition for Rehearing in the above captioned matter.

The opinion of the Court of Appeals was entered on October 6, 1980. Appellant's Petition for Review was denied by the Oregon Supreme Court on February 4, 1981. Appellant's Petition for Rehearing was denied by the Oregon Supreme Court on March 17, 1981.

This appeal is taken pursuant to 28 USC Section 1257(2).

Jossi Davidson
Attorney for Defendant-Appellant
108 S. Water Street
P. O. Box 565
Silverton, Oregon 97381

Telephone: (503) 873-5366

CERTIFICATE OF SERVICE

I, Jossi Davidson, hereby certify that on this 15th day of June, 1981, the foregoing Notice of Appeal to the Supreme Court of the United States was served upon the following people by mailing them a true copy thereof via first class mail with postage prepaid to the following addresses:

William F. Gary
Solicitor General
100 State Office Building
Salem, Oregon 97310
Attorney for State of Oregon

Richard M. Botteri
1215 Oregon National Building
610 S. W. Alder Street
Portland, Oregon 97205
Attorney for John Vandenberg

Jossi Davidson
Attorney for Appellant

Filed this 15th day of June, 1981, in the Supreme Court of Oregon.